Group Health, Inc. *and* Gary Bloom

Office and Professional Employees International Union, Local 12 *and* Gary Bloom. Cases 18–CA–12025 and 18–CB–3144

February 2, 1998

SUPPLEMENTAL DECISION AND ORDER ON REMAND

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

This case is before the National Labor Relations Board pursuant to the Board's request for a remand from the Eighth Circuit, which was granted on November 4, 1997. On January 8, 1998, the Respondent Employer and the Respondent Union filed a motion to amend the settlement agreements. We accept the Eighth Circuit's decision in *Bloom v. NLRB*, 30 F.3d 1001 (1994), as the law of the case, grant the motion to amend the settlement agreements and approve the second revised settlement agreements as consistent with the court's decision in *Bloom* and as comporting with the Board's *Independent Stave* analysis for approving settlement agreements.

Procedural History

On January 26, 1993, the Board approved the stipulation of facts in this case and transferred the proceeding to the Board. The stipulation indicated that the Respondent Employer and the Respondent Union were parties to a collective-bargaining agreement containing the following union-security clause:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days. . . .

The stipulation also indicated that union dues and initiation fees were withheld from the pay of Charging Party Gary A. Bloom without his authorization, and that he was advised by the Union that he must join the Union or it would seek his discharge.

On May 10, 1993, the General Counsel filed with the Board a motion for approval of settlement agreements.[1] The Board granted this motion by unpublished Order dated September 29, 1993. Thereafter, the Charging Party filed a petition for review with the Eighth Circuit.

On July 27, 1994, the Eighth Circuit Court of Appeals issued a decision granting the Charging Party's petition for review and remanding the case to the Board, finding that because the union-security clause was unlawfully applied, it must be expunged from the parties' collective-bargaining agreement.[2] On June 2, 1995, the General Counsel filed a second motion for approval of settlement agreements. These revised settlement agreements provided that the above union-security clause would be expunged and a new union-security clause substituted. On February 27, 1997, the Board issued a Decision and Order approving the revised settlement agreements (*Group Health II*).[3] The Charging Party again petitioned for review of the Board's decision.

While this case was pending before the Eighth Circuit, the Sixth Circuit, on September 8, 1997, issued its decision in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997).[4] Thereafter, the Board, as then-constituted, requested that the Eighth Circuit remand the instant case to the Board for consideration in light of *Buzenius*. This request was granted by order of November 4, 1997. All of the parties filed statements of position with respect to the Board's request for remand from the Eighth Circuit.

On January 8, 1998, in response to the Board's request for remand from the Eighth Circuit, the Union and the Employer filed with the Board a motion to amend the previously revised settlement agreements which the Board has granted. As amended, the revised agreements (hereinafter referred to as the ''second revised settlement agreements'') provide for the expunction of the ''members in good standing'' union-security clause that the Eighth Circuit found in *Bloom* had been unlawfully interpreted and applied, and for substitution of a new union-security clause as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's

[1] The settlements (one between the General Counsel and the Respondent Union and one between the General Counsel and the Respondent Employer) provided that the Respondents would not give effect to the above-cited union-security clause unless the clause also provided that the employees only need pay the Union's periodic dues and initiation fees. The settlements also indicated that the Charging Party had been reimbursed for any moneys wrongfully withheld from him. Further, the settlements provided that all employees would be given notice of their *Beck* rights to object to paying dues for nonrepresentational union expenditures, and that all employees who objected to paying full union dues would be reimbursed.

[2] *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994).

[3] 323 NLRB No. 31 (Feb. 27, 1997).

[4] Revg. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995).

> initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities.

In all other respects, the second revised settlement agreements are the same as the revised settlement agreements previously approved by the Board in *Group Health II*.[5]

The Employer and the Union assert that they have negotiated the new union-security language for inclusion in their collective-bargaining agreement in order to settle this case without additional litigation. They maintain that the additional explanatory language meets the standard for union-security clauses set forth in the Sixth Circuit's *Buzenius* decision even on the most strict reading of the that case. They assert that approval of the second revised settlement agreements will further all the interests protected by the NLRA, most particularly, the interest in the prompt settlement of disputes arising under the Act on just and reasonable terms.

The General Counsel has also urged the Board to approve the agreements, on the grounds that they completely remedy all the complaint allegations under extant Board law.[6] The Charging Party urges rejection of the agreements, arguing that the first sentence of the amended union-security clause is illegal, overbroad, and unenforceable under *Communication Workers v. Beck*[7] and *Pattern Makers v. NLRB*,[8] and complies with neither the letter nor the spirit of *Buzenius*.

Approval of the Second Revised Settlement Agreements

Given the age of this case and its procedural posture,[9] we have now determined that this case is not the appropriate vehicle in which to address the issue raised by the Sixth Circuit's *Buzenius* decision.[10] Rather, after careful consideration, the Board has decided to grant the motion to amend the settlement agreements and to approve the second revised settlement agreements. We find that they are reasonable and appropriate under *Independent Stave*, 287 NLRB 740 (1987), and they conform to the intent of the Eighth Circuit's decision in *Bloom*.

In *Independent Stave* the Board set forth the factors it would examine in determining whether to approve a settlement agreement:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

287 NLRB at 743. Applying these factors and considering all the circumstances, we have determined that the second revised settlement agreements effectuate the purposes and policies of the Act.

The Respondents have agreed to be bound by the second revised settlement agreements, and the General Counsel urges their approval. As we noted in our earlier decision, although the Charging Party opposes the revised settlements, where the other factors in *Independent Stave* are met and where the other parties in the case agree to be bound to the settlements, the Board is not precluded from approving a settlement agreement over the objections of a charging party. See, e.g., *Shine Building Maintenance*, 305 NLRB 478 (1991).

We find that the other factors in *Independent Stave* are met. The revised settlements are reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. In addition, there is no allegation by any party that the second revised settlement agreements are a product of fraud, coercion, or duress, nor is there any evidence that the Respondents have engaged in a history of violations of

[5] Thus, the agreements include provisions for notice to each employee in the bargaining unit of changes to the union-security clause and of employees' rights and obligations under that clause.

[6] Noting that the Board traditionally does not reconsider precedent when it is reviewing a settlement agreement, the General Counsel has urged the Board not to do so here.

[7] 487 U.S. 735 (1988).

[8] 473 U.S. 95 (1985).

[9] On January 26, 1993, the Board approved the stipulation of facts in this case and the proceeding was transferred to the Board. Thereafter, the General Counsel filed, and the Board approved, two different settlement agreements. Because of this, briefs on the merits of the stipulation have never been filed. Moreover, since the date of the Board's request to the Eighth Circuit for remand, one Board member has departed, and three new members have joined the Board.

[10] Member Hurtgen wishes to emphasize his view that he is not necessarily endorsing the clause involved herein. He agrees only that it is not inconsistent with the Eighth Circuit law of the case and is a satisfactory settlement under that law. In another context, he might well hold that the Board as a matter of policy, should require a different clause or, at least, should have a different clause as a model.

the Act or have breached previous agreements resolving unfair labor practice disputes.

The Union-Security Clause Language

In addition, as was the case with the first revised settlement agreements, we find that the concerns about the original settlements expressed by the Eighth Circuit in *Bloom* have been rectified. First, we note that the language objected to by the court has been deleted and different language substituted. The Charging Party argues that the substitute language is as unacceptable under *Bloom* as the ''members in good standing'' language in the original settlements because the statement that ''[a]ll Employees . . . shall, as a condition of continued employment, become and remain members of the Union'' continues to mislead employees as to their right to refrain from joining the union.

We disagree. The reason given by the Eighth Circuit for requiring expunction of the ''members in good standing'' language is that this language in the union-security clause was unlawfully interpreted and applied. The amended union-security clause now present in the collective-bargaining agreement has not been unlawfully interpreted or applied, and gives an additional explanation of what the limits of an employee's financial obligations to the Union are. Further, this additional explanatory language meets the court's concern that ''employees subject to a union-security clause cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees . . . .''[11] The amended union-security clause provides notice to the employees in their collective-bargaining agreement that they need not pay full union dues and fees.

Contrary to our dissenting colleague, we do not view approval of the second amended settlement agreements as inconsistent with the law of the case established by the Eighth Circuit on the theory that the clause is ''misleading.'' We do not understand the court to have insisted that the only possible lawful clause would be one that eschews the literal language of the statute. Rather, as we understand it, the court was concerned that the temporary posting of an explanatory notice would not suffice to make employees aware of the ''lawful extent of their union obligation'' after the posting period had ended. The second amended settlement agreements incorporate a clause with an explanation of ''the lawful extent of [the employees'] union obligation'' and that explanation will remain in the clause so long as it is in effect.

In addition, current Board law requires that newly hired employees be given notice of their *Beck* rights before or at the time the union seeks to obligate them under a union-security provision.[12] Accordingly, as we noted in our earlier decision, ''as new employees enter the unit, they will introduce into the unit a continuing awareness of *Beck* rights.'' With the removal from the collective-bargaining agreement of the language that the court held had been unlawfully interpreted and applied, the presence in the collective-bargaining agreement of language describing the limits of employees' financial obligations to the Union, the written notice sent out to each unit member that the language has been expunged and new language substituted, and the requirement under *Weyerhaeuser* that all unit employees be notified of their *Beck* rights, we believe that the court's concerns about the adequacy of a temporary notice posting have been met.

Scope of the Remedy

We adhere to our earlier decision in 323 NLRB No. 31 regarding the scope of the remedy. As we found there, although the Charging Party argues that all unit employees should be reimbursed for all dues and initiation fees paid to the Union since June 23, 1991,[13] there is no evidence that any employee, other than the Charging Party, suffered any economic loss because of reliance on the provisions of the union-security clause. The second revised settlement agreements indicate that the Charging Party has been reimbursed all dues and fees that were unlawfully withheld from his wages. Further, the second revised settlements do provide that all employees who became members of the Union during the statutory limitation period may become nonmembers, and such nonmembers may register an objection to full dues and fees and if they do so, will be reimbursed for that portion of the dues and fees they have paid that are not attributable to the Union's representational activities.

In *Weyerhaeuser*, the respondents excepted to the judge's recommended remedial requirement that the union reimburse the charging party for all dues collected since his resignation from membership and filing of a *Beck* objection. The Board held that the union was required to reimburse only those dues determined to be in excess of the amount that the union could lawfully collect under *Beck*. 320 NLRB at 349 fn. 4.[14] Accordingly, in light of all these factors, we find that the scope of the remedy set forth in the second revised settlement agreements is adequate and that it will ef-

[11] *Bloom*, 30 F.3d at 1004–1005 (citations omitted; emphasis in the original).

[12] *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998).

[13] The Eighth Circuit, in fn. 2 of its decision, indicated that ''having concluded that the Board should not have approved the settlement agreements because they do not expunge the union security clause, we need not consider the other grounds upon which *Bloom* challenges the agreements.'' 30 F.3d at 1005 fn. 2.

[14] See *Gilpin v. American Federation of State, County, & Municipal Employees, AFL–CIO*, 875 F.2d 1310, 1314–1316 (7th Cir. 1989).

fectuate the purposes and policies of the Act to approve the second revised settlement agreements.[15]

ORDER

The Board, having duly considered the matter, orders that the General Counsel's motion is granted and the complaint is dismissed in its entirety, and the case is remanded to the Regional Director for Region 18 for further appropriate action.

CHAIRMAN GOULD, concurring.

I agree with the majority's decision to grant the motion to amend the settlement agreements and to approve the agreements and dismiss the complaint. Contrary to my colleagues' assertion, however, this *is* an appropriate forum in which to address my partial adoption of the *Buzenius* rationale in my concurring opinion in *Monson Trucking*.[1] I am of the view that the Board should adopt my concurring opinion in *Monson Trucking*, that union-security clauses requiring unit employees to become ''members'' or ''members in good standing,'' without concurrent definition, are facially invalid under the National Labor Relations Act.[2]

The present controversy over the permissible language of union-security clauses comes as no surprise to anyone who has been involved in labor law for any length of time. As a practitioner and an academic in the field since 1961, it has long been apparent to me that the area of union-security clauses is fraught with obfuscation and ambiguity. The Board is responsible for a good deal of the problem as a result of its 1958 decision in *Keystone Coat, Apron & Towel*, 121 NLRB 880. That case set forth a ''model'' union-security clause which stated in part that ''[i]t shall be a condition of employment that all employees of the Employer covered by this agreement . . . shall . . . become and remain members in good standing in the Union.'' The Board deemed this language to be the maximum permissible in conformity with the requirements of the Act. Id. at 885.

The use of the term ''members in good standing'' implies that actual ''full'' membership in the union is required in order to retain one's employment, something that has long been recognized as contrary to what the Act permits. Indeed, insofar as some unions require their members to be ''members in good standing'' for reasons unrelated to the periodic payment of dues and initiation fees (for instance, as it relates to attending meetings and payment of assessments and fines),[3] *Keystone* is inconsistent with an interpretation of our statute which prohibits the conditioning of employment upon considerations other than the payment of periodic dues and initiation fees, let alone the present interpretation discussed, infra, under which unions and employers are precluded from requiring full membership.

As early as 1954, however, even prior to *Keystone*, the Supreme Court stated in dicta that the ''legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees.'' *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954). In 1963, the Supreme Court in *NLRB v. General Motors*,[4] held that membership within the meaning of Section 8(a)(3) does not consist of full membership but consists exclusively of the obligation to pay periodic dues and initiation fees as a condition of employment under a valid union-security clause. The Court stated that: '''Membership' as a condition of

[15] Our concurring colleague has set forth his broad views concerning the language that can lawfully be used in a union-security clause. We agree that the Board should address that issue. We do not agree that this is an appropriate case in which to do so.

As our colleague knows, the Board now has before it cases in which the issue can be addressed and resolved. Further, in those cases, the Board can, and will, receive the views of all parties and interested amici. We believe that this open and deliberative process will help us to formulate intelligent and practical guidance for unions, employers, and employees who are covered by the Act.

By contrast, the instant case is not an appropriate vehicle for resolving this issue. As discussed supra, the narrow question in this case is whether the settlement agreements are acceptable within the parameters of *Independent Stave* and the circuit court law of this case. Our colleague agrees that the settlements are acceptable. the difference between us is that he would go further than is necessary for the disposition of this case, while we would await full briefing by all interested parties and amici in an appropriate case.

[1] 324 NLRB No. 149, slip op. at 6–8 (Oct. 31, 1997). I set forth this view initially in *Teamsters Local 443 (Connecticut Limousine Services)*, 324 NLRB No. 105, slip op. at 6–7 (Oct. 2, 1997) (Chairman Gould, dissenting).

[2] As set forth more fully in my concurrence in *Monson Trucking*, however, I disagree with the Sixth Circuit's reliance in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), revg. *Paperworkers Local 1033 (Weyerhauser Paper Co.)*, 320 NLRB 349 (1995), on *Pattern Makers*, 473 U.S. 95, 104–106 (1985), and I would, for the reasons stated in *Monson*, supra, slip. op. at 6–7, reverse the Board's holding in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), to which the Court deferred.

[3] See, e.g., *DOL v. Aluminum & Glass Workers Local 20*, 941 F.2d 1172, 1174, (11th Cir. 1991), where a local union constitution defines ''members in good standing'' as ''[a]ll dues (except current month's dues), fines, reinstatement fees, and assessments, must be paid in full not later that the adjournment of the nomination meeting.'' See also *Graphic Arts International Union Local 32B*, 250 NLRB 850, 854–855 (1980); *Bay Area Typographical Local 21 (Northwest Publications)*, 218 NLRB 812, 814 (1975); and *Union Starch & Refining Co.*, 87 NLRB 779, 780 (1949), enfd. 186 F.2d 1008 (7th Cir. 1951). Cf. Macaluso, *The NLRB ''Opens the Union,'' Taft-Hartley Style*, 36 Cornell L. Q. 443 (1951). Such definitions of ''good standing'' are likely to lead employees to believe that this language in a union-security clause requires much more than the payment of periodic dues and initiation fees. As the Board itself has noted, ''it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretive decisions will literally interpret the clause as requiring full membership and all attendant financial obligations, e.g., assessments. At a minimum, they will be confused about their obligations.'' *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1991), enf. denied sub nom *Electronic Workers IUE v. NLRB*, 41 F.3d 1552 (D.C. Cir. 1994).

[4] 373 U.S. 734 (1963).

employment is whittled down to its financial core.'' Id. at 742. The view that full membership is not required was reiterated by the Court only 4 years later in *NLRB v. Allis Chalmers Mfg. Co*., 388 U.S. 175 (1967). Indeed, it formed the basis for the Court's findings that it was lawful to impose union discipline on full members. The Court recognized that the lawfulness of a union's ability to assess penalties against employees it represents is wholly dependent on whether the employee has voluntarily chosen to accept the obligations of membership.[5]

Despite this clear statement by the Court that full membership cannot be compelled as a condition of employment, neither unions, employers, nor the Board have undertaken to change or refine the standard language of most union-security clauses, as set forth in *Keystone*: that employees must become and remain ''members'' or ''members in good standing.''

In *Beck v. Communication Workers of America*, 487 U.S. 735 (1988), the Court upheld the right of nonmember unit employees to object to paying through union dues and initiation fees for expenditures that are not germane to collective bargaining and contract administration. The Court revisited the meaning of ''membership'' under Section 8(a)(3), and held that the most that may be required under Section 8(a)(3) is the payment of ''those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'''[6]

In the wake of *Beck*, the Board addressed the ''member in good standing'' language, and found that it was ambiguous. In *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1991), enf. denied sub nom *Electronic Workers IUE v. NLRB*, 41 F.3d 1552 (D.C. Cir. 1994), the Board found that the union had violated its duty of fair representation by maintaining a union-security clause requiring that employees become and remain ''members of the Union in good standing'' as a condition of employment, without apprising them of their *General Motors* rights. The Board also specifically rejected the model clause in *Keystone*, because of its finding that the phrase ''membership in good standing'' is ambiguous. Id. at 1041. The Board indicated that, in view of that ambiguity, a union was required to give employees notice as to what their obligations were, but did not find the clause to be facially unlawful or offer a new model for an appropriate union-security clause.[7] Thus, the clause has continued to be used.

As I have noted before, even today, many workers and employers do not understand that ''membership'' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding.[8] Indeed, the Board's failure to do more to correct the misimpression of this term has allowed unions and employers to perpetuate it, and thus reap the benefits of the confusion over the use of the word ''membership'' in union-security clauses. By failing to require the parties to accurately define this word, the Board has permitted unions and employers to mislead the employees it represents into believing that they must join the union or lose their jobs. Any such scheme to keep employees uninformed about their rights is at odds with traditional concepts of trade unionism, that is, the protection and defense of the worker from exploitation and unfair or arbitrary treatment. In this regard, unions and employers have been permitted to sow confusion to the disadvantage of those which unions have a duty to represent fairly, and the Board, by failing to adopt my views in *Monson* today, continues to be their accomplice.

As Judge Posner noted in *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 991 (7th Cir. 1997):

> [N]othing we have said has been intended to suggest that unions and employers have the privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either by itself or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

The point is that ''membership'' must be defined. Member Brame, in dissent, relies upon Judge Posner's opinion to state that the settlement agreements are deficient because they speak in terms of ''membership.'' But this is what the Act itself states and what all Supreme Court authorities alluded to above have done. Thus, the dissent contradicts the statutory language as

[5] See Atleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 U.C.L.A. L.Rev. 681 (1970); Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L.Rev. 227 (1968); Gould, *Some Limitations Upon Discipline Under the National Labor Relations Act: The Radiations of Allis Chalmers*, 1970 Duke L.J. 1067; Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers, and Scofield*, 38 Geo. Wash. L.Rev. 187 (1969); and Wellington, *Union Fines and Workers' Rights*, 84 Yale L.J. 1022 (1976).

[6] 487 U.S. at 762–763 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

[7] In *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), the Board held that, without regard to the precise language of a union-security clause, union members, as well as nonmembers, must receive notice of their *Beck* and *General Motors* rights in order to assure that they had not been mislead to believe that payment of full dues and assumption of full membership is required under a union-security clause. Id. at 350.

[8] See my speech ''Campaign Finance Reform and the Union Dues Dispute Under Beck,'' given October 8, 1997, to the Iowa Chapter of the Industrial Relations Research Association. 195 DLR E-1 (Oct. 9, 1997).

used and *defined* by the Court for four and one-half decades. The fact that the second revised settlement agreements' language mirrors the statute and reflects the judicially approved definition of the statutory term ''membership,'' is why the settlements are compatible with the Act.

To reason, as does the dissent, Congress would have to remove the word ''membership'' from Section 8(a)(3). This Board must interpret the Act as written.

As stated above, there are those—both employers and employees—who may not fully understand the legal nuances concerning the term ''membership.'' For some who are engaged in the field of labor law, there is no mystery to the term. But, for the Board to allow the term ''membership'' to go undefined merely perpetuates the illusion that full union membership is a requirement of employment, a requirement completely inconsistent with the Act's standards, as fashioned by the Supreme Court in numerous interpretations. It is time for the Board to put an end to this confusion and frankly state that membership undefined is inherently ambiguous at best and misleading at worst. To state this obvious, yet still unaccepted, point (unaccepted by the Board, that is) is to dramatize anew the fact that the Emperor, who tolerates contract clauses in which ''membership'' is left undefined, has no clothes!

The present case provides the Board with the opportunity to correct the mistake it made 40 years ago in *Keystone Coat*, and to clarify for unions, employers and employees alike what the permissible requirements are under a union-security clause in terms of employees' obligations to a union. It is the Board's duty to give guidance to the public as to what is acceptable under the Act, and in so doing, diminish the potential for wasteful litigation that is now present in this area.[9]

In my view, the Board should do so today, both by adopting the views set forth in my concurring opinion in *Monson*, and by setting forth a new model union-security clause as a ''safe harbor'' for unions and employers who wish to comply with the requirements of the Act. In this regard, I propose the following as a model union-security clause in collective-bargaining agreements:

> On or after the thirtieth day (or eighth day if an 8(f) prehire agreement) following the beginning of employment, the effective date of this agreement, or the execution date of this agreement, whichever is later, every employee covered by this agreement shall, as a condition of employment, become and remain a member of the Union. Membership as used herein shall mean only the obligation to pay periodic dues and initiation fees uniformly required, or, in the event that the employee objects to the payment of full dues and initiation fees, only the obligation to pay periodic dues and initiation fees related to representational costs.

A clause such as this clearly informs the reader—lay people, lawyers, and labor relations experts alike—that ''member'' as used therein is a term of art that requires only a financial commitment from the employee. This information is essential to enable employees to make an informed choice about their financial commitment to the union. I believe that adoption of such a model clause would be helpful to and necessary for practitioners, employees, and employers, and would begin to rectify the problems created by *Keystone*. I deeply regret my colleagues' reluctance to adopt my concurring opinion in *Monson Trucking*, and to join me in adopting a model clause to guide the public in this area.

My colleagues in the majority state that by urging the acceptance of my position in *Monson Trucking* and by setting forth a new model union-security clause, I am going beyond what is necessary for the disposition of this case. However, the Supreme Court spoke unequivocally on these issues 35 years ago,[10] and made it clear for all to see how lawful membership requirements must be defined. Therefore, I see no reason to wait for another case in order to address them. In addition, I see no reason to delay a decision so that the Board can receive further briefs on the issue in order to ''formulate intelligent and practical guidelines for unions, employers and employees.''

Moreover, this is not a case of first impression for the Board, which, as Justice Frankfurter aptly stated, is ''equipped with its specialized knowledge and cumulative experience.'' *San Diego Bldg. Trades v. Garmon*, 359 U.S. 237, 242 (1959). The Board's expertise has been chronicled by the Court on countless occasions. See, e.g., *NLRB v. Erie Resistor*, 373 U.S. 221, 236 (1963); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Auciello Iron Works v. NLRB*, 517 U.S. 781 (1996); *Holly Farms Corp. v.*

[9] See my dissent in *Flint Iceland Arena*, 325 NLRB No. 43 (Jan. 23, 1998), where I also urge the diminishment of potentially wasteful litigation within the context of non-Board settlements. Illustrative of a decision which substantially diminished litigation through its broad and clear mechanical rule relating to jurisdiction was *Management Training*, 317 NLRB 1355 (1995). The doctrine in *Management Training* has been approved in *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997), and in *Pikeville United Methodist Hospital v. NLRB*, 109 F.3d 1146 (6th Cir. 1997), where we asserted jurisdiction over private employers. Consistent with this view, I have also advocated the promotion of voluntary recognition agreements in order to avoid unnecessary litigation. See *Smith's Food & Drug Centers*, 320 NLRB 844, 847–848 (1996) (Gould, W., concurring). The Board has concurred with this approach in its promotion of settlement agreements negotiated where a decertification petition has been filed and an incumbent union has an established relationship with the employer. *Douglas-Randall, Inc.*, 320 NLRB 431 (1995).

[10] *NLRB v. General Motors*, supra.

NLRB, 517 U.S. 392 1406 (1996); and *Allentown Mack Sales v. NLRB*, Docket No. 96-795, slip op. at p. 4 (Jan. 26, 1998).

Additionally, this issue has been with the Board since *Keystone*, and the public has been without guidance as to lawful union-security clause language since *Paramax* issued. Further, the issues here have also been thoroughly and thoughtfully addressed by various courts of appeals. The Board in fact requested that this case be remanded by the Eighth Circuit in order to do exactly what I have done in my concurrence—address the impact of *Buzenius* on Board law. It is the Board's responsibility to act quickly and definitively in order to effectuate the purposes of the Act. And, as the expert agency, it is the Board's obligation so to do.

Accordingly, although I join my colleagues in granting the motion to amend the settlements and approving the settlement agreements, I do so because I believe that the union-security clause presented by the amended settlements is in accord with my views as set forth in *Monson Trucking*, as well as with the holdings of *Buzenius* and *Bloom*, and because the clause is in accord with the standard the Board should adopt as its own, i.e., that union-security clauses requiring that an employee be a ''member'' or ''member in good standing,'' without concurrent definition of those terms, are facially invalid.

MEMBER BRAME, dissenting.

I would not approve the settlement agreements in this case, both because they fail to remedy defects explicitly identified by the court of appeals, and because they would put the Board in the business of issuing advisory opinions in unfair labor practice proceedings without litigation of the issues.

The controversy here originally stemmed from the following union-security clause in the Respondents' collective-bargaining agreement:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

The Eighth Circuit, in reversing the Board's approval of settlement agreements that did not alter this contract language,[1] concluded that the language was ''misleading''[2] and ''overly broad,''[3] conveying to employees that, in order to keep their jobs, they must acquiesce to the clause's literal requirement, i.e., become union members. Further, the court found that the clause had been ''unlawfully interpreted and applied.''[4] Therefore, the court held, inter alia, that ''an adequate remedy [of the alleged violation of Section 8(b)(1)(A)] . . . requires expunction of the offending clause.''[5]

Now the parties, other than the Charging Party, seek Board sanction for revised settlement agreements expressly incorporating a newly negotiated contractual union-security clause:

> All employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities.

This new contract provision suffers from the same infirmities condemned by the court in *Bloom*. The *Bloom* court found the previous contract language misleading, and the new clause similarly misleads employees regarding their union-security obligations. Although the settlement agreements respond to the letter of the court's earlier decision by expunging the previous contract language, they fail to address the court's more fundamental concern that the union-security provision of a collective-bargaining agreement enlighten rather than confuse employees concerning the extent of their obligations to their bargaining representative.

The new clause begins with essentially the same first sentence as the unlawful clause and warns employees that they are required to become ''members'' of the Union. It thus misstates existing law regarding the obligations of employees toward their bargaining representative. Thirty-five years ago, in the landmark case *NLRB v. General Motors*,[6] the Supreme Court held that under the second proviso of Section 8(a)(3), which authorizes union-security arrangements, ''the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues.'' More recently, the Board and courts have repeatedly found that union-se-

[1] *Bloom v. NLRB*, 30 F.3d 1001 (1994).
[2] Id. at 1004.
[3] Id. at 1005.
[4] Id.
[5] Id.
[6] 373 U.S. 734, 742 (1963); see *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985); *Communications Workers v. Beck*, 487 U.S. 735 (1988).

curity clauses providing that employees must become union members are misleading to bargaining unit employees.[7] In *Wegscheid*, the Seventh Circuit found the clause at issue misleading even though it was ''a close paraphrasing'' of the language of the second proviso. Chief Judge Posner, writing for the majority, explained:

> True, it is a close and accurate paraphrase of the statute, read literally; but . . . the Supreme Court has glossed the statute to change its literal meaning, indeed virtually to invert it. Read literally, section 8(a)(3) authorizes the collective bargaining agreement to compel all the employees in the bargaining unit to join the union and pay the full union dues. As construed judicially, it authorizes no such thing; all that the collective bargaining agreement can require is the payment of the agency fee. This has been settled law for some time, and the only realistic explanation for the retention of the statutory language in collective bargaining agreements, as the courts have observed, is to mislead employees about their right not to join the union.[8]

I agree with Judge Posner's assessment. In my view, the incremental approach taken by the Respondents here, making small modifications to their contract language but at the same time retaining the apparent requirement of membership, can, as Judge Posner feared, have no other purpose and effect than to mislead employees to deprive them of their *General Motors* rights.

Moreover, the remaining provisions of the new clause cannot cure the defect of the opening sentence and may, in fact, exacerbate its unlawful effect. By stating that ''membership is required only to the extent that,'' the second sentence implies that the categories of ''regular service fee payer'' and ''objecting service fee payer'' describe different *levels* of membership, rather than *alternatives* to membership. Nowhere does the clause inform, or even suggest to employees, that they may choose to be *nonmembers*, a vital right explicitly protected by Section 7 of the Act, and that a nonmember merely owes a certain financial obligation to the Union, which may be satisfied in either of two ways. Furthermore, the Board should not rationalize away this defect by finding that the Respondents, having misinformed employees of their obligations in the first sentence, adequately remedy the unlawful effect in the ''fine print.''

The approval of settlement agreements containing this language represents a step backward in the Board's efforts to define and elucidate the rights and obligations of employees with respect to their bargaining representatives and the duties of unions toward the employees they represent and whose financial support they can require under the narrow authority conferred by the Act. This result cannot be reconciled with the clear message of recent court decisions, including that of the Eighth Circuit in *Bloom*.

Moreover, by approving the settlement agreements, the majority essentially permits the Union to make an ''end run'' around its responsibilities to unit employees by seeking, and now obtaining, the Board's imprimatur on language that, if litigated based on an alleged violation of Section 8(b)(1)(A), would be deemed a breach of its statutory obligation. In my view, it is unwise for the Board to permit the settlement process to become a mechanism for obtaining the Board's imprimatur, in advance and without the benefits of litigation, on language that may be the subject of future unfair labor practice proceedings.

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[7] See, e.g., *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993), enf. denied 41 F.3d 1532 (D.C. Cir. 1994); *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997); *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997).

[8] 117 F.3d at 990. In *Buzenius*, supra, the Sixth Circuit similarly found: ''To permit the [collective-bargaining agreement] to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation.'' 124 F.3d at 792.